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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1933

No. 578

ALICE ASCHENBRENNER,
Petitioner,

vs.

UNITED STATES FIDELITY & GUARANTY CO.,
Respondent.

ANSWER OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI.

BRANDENBURG & BRANDENBURG,
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ANSWER TO CONSTITUTIONAL QUESTION.

The facts in the case are without dispute. They show in substance the effort of deceased to board a moving train which was traveling at a rate of speed of from seven to ten miles per hour when he gained contact with it, and his falling from the first step of the vestibule to his death during a period within which the train had traveled a distance of between twenty and thirty feet. These facts being without dispute, the question became purely one of law, as to

whether under such circumstances the deceased was a passenger at the time that he fell to his death. The overwhelming and practical unanimity of authority, as set out in the opinion of the Circuit Court of Appeals, is to the effect that he had not become a passenger, and the double indemnity provision of the policy applicable only to passengers was, therefore, not applicable to the deceased.

On reversal of a judgment at law in a jury case the court need not remand for a new trial if the case involves only propositions of law so that there is nothing to retry. (*Forged Steel Wheel Co. v. Lewellyn*, 251 U. S. 511, 64 Law Ed. 380.) Obviously if this were not the rule there would be no end to litigation.

Sending the present case back for a new trial would only redevelop the facts that have now been exhaustively presented by both sides, and if the trial court should decline to grant a verdict in favor of the defendant and the jury should render a verdict in favor of the plaintiff, the same routine would have to be observed again—an appeal, a reversal, a retrial and so on *ad infinitum*.

The remaining points raised by the petitioner are all fully considered in the opinion of the Circuit Court of Appeals and, therefore, we believe need not be alluded to by the respondent here in detail. The court aptly said, in answer to petitioner's position ~~petition~~ in that court, that full force should be given to the words "platform, steps or running board," and said further, "but equal force should be given to the words 'while a passenger.' If the appellee has not

brought herself within *all* the conditions precedent to recovery under the policy she cannot be awarded double indemnity."

The only case cited by the petitioner here in the trial court and in the Circuit Court of Appeals that apparently was even close to being in point, was *Fidelity & Casualty Co. v. Morrison*, 129 Ill. App. 360. The reasoning of that case is so much at variance with the overwhelming weight of authority, as that authority is presented in the opinion of the Circuit Court of Appeals, that it was rejected by the court. The case has never been cited as authority in any other case that we have been able to discover, nor has the holding been passed upon by the Supreme Court of Illinois. Suffice it to say that the remaining authorities cited by the petitioner here do not involve the question involved in the case at bar, namely, at what point one attempting to board a train which is in motion before the attempt is made, acquires the status of passenger thereon. In the case at bar no two answers to the question are possible. It is clear as a matter of law that the deceased did not acquire a place of safety, and there is nothing, therefore, for the jury to pass upon. This phase of the case is fully covered by the opinion of the Circuit Court of Appeals in the following language:

> "In the instant case, however, the event itself shows that decedent never reached a place of safety: else he would not have been killed! His position upon the lower step of the car was of so brief a duration, and his lack of equilibrium during that instant of time was so evident, that

it would be paradoxical to say that the decedent had reached a place of safety at the time he fell off the car. His attempt to board that train and his fall therefrom were in reality parts of the same operation—an operation by which the decedent attempted, but unsuccessfully attempted, to attain the status of passenger."

It is respectfully asked, therefore, that the petition for the writ of certiorari be denied.

Dated, San Francisco, California,
November 27, 1933.

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